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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-646

SYSTEM COUNCIL T-4, COMPRISED OF LOCAL UNIONS 134, 165, 315, 336 AND 399 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

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Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To: The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, System Council T-4 Comprised of Local Unions 134, 165, 315, 336 and 399 of the International Brotherhood of Electrical Workers, AFL-CIO, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a decision of the National Labor Relations Board which found that the Illinois Bell Telephone Company had not engaged in conduct in violation of Sections 8(a)(1) and 3(a)(3) of the National Labor Relations Act, Title 29, U. S. C. Sections 158a.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is officially reported as *System Council T-4, Comprised of Local Unions 134, 165, 315, 336, and 399 of the International Brotherhood of Electrical Workers, AFL-CIO,* at 446 F. 2d 815. It is also printed in the Appendix to this Petition. (App. A3)

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit affirming the order of the National Labor Relations Board was entered July 19, 1971. (App. A2) A timely Petition for Rehearing was denied on August 11, 1971. (App. A1) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. Where employees are entitled to fringe benefits under an existing collective bargaining agreement by the maintenance of their employer-employee relationship, is not the employer's denial of pension, vacation and other fringe benefits to striking employees a discrimination in terms and conditions of employment in violation of the National Labor Relations Act.

2. Does an employer's statement issued to its striking employees, which, on its face warns of loss of benefits to those employees who continue on strike, constitute a threat in violation of the National Labor Relations Act, and constitute conduct which is inherently destructive of employees' rights sufficient to shift the burden to the employer to require that a legitimate business justification for such conduct be presented.

STATUTE INVOLVED.

Title 29, United States Code, Section 158.

§ 158. Unfair labor practices.

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or termi-

nated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

STATEMENT OF THE CASE.

Illinois Bell and the Petitioner, at times material, were parties to a collective bargaining agreement (G. C. Exh. 2; Tr. 6).[1] On May 8, 1968, the employees represented by Petitioner began a strike against Illinois Bell. This strike was concluded on or about September 23, 1968. Approximately 11,800 employees in units represented by the Petitioner were involved in this strike (Tr. 11-12). On June 4, 1968, Illinois Bell mailed to its employees in units represented by the Union a document entitled "Important Message to All Employees": This document stated,

> If you have been off the job on an unpaid absence, you should know it is a long-standing company practice to adjust an employee's net credited service date whenever the number of unpaid days of absence exceeds 30 consecutive days. (Service dates are important in computing such things as vacation allowances, benefits, pension dates, and other items.)
>
> If any employee who has not been reporting for work because of strikes does report for work by June 6, 1968, no adjustment in the service date will be made. But under this practice, any employee who has been absent because of strikes and who does not report for work by June 6 will have his service date adjusted by the number of unpaid consecutive days absent in excess of 30.
>
> All unions representing Illinois Bell employees have been reminded of this practice and advised that this information is being distributed to all employees.
>
> ILLINOIS BELL TELEPHONE COMPANY.

1. "G. C. Exh." refers to the General Counsel Exhibit in the National Labor Relations Board proceedings below. "Tr." refers to the transcript of that proceedings. Certified copy of the transcript and exhibits has been filed with the Court.

The practice referred to in this June 4 message to employees is not stated in General Counsel's Exhibit 2, the collective bargaining agreement relevant to this proceeding (Tr. 7-8).

The collective bargaining agreement between the respondent company and the unions (GC Ex. 2) was in effect during the entire period of the strike. (Tr. 6 and 84)

Prior to the strike, the company determined an employee's seniority by his service date. (Tr. 14, 18, 36 and 37, and GC Ex. 3) However, the company decided that after the strike an exception would be made to the previous policy. (Tr. 36) The company did not follow the contract provisions or past company practice regarding vacation time being considered as work time, even though the contract was in effect during the time of the strike. (Tr. 71 through 84)

The contract provides that employees will receive vacations in varying amounts based upon the employee completing months or years of service. (Article XX, Section 1 of GC Ex. 2) The contract provides that no change which would reduce or diminish the pension or disability benefits of employees, will be made without the consent of the Union. (Article XXIV of GC Ex. 2) The Union refused to allow the company to add language to the collective bargaining agreement, Article XXI regarding adjustment of the net credited service date because of strike time. (Tr. 95 and 96 and 112)

The company actually made changes on the employees' personnel records to adjust the net credited service date due to absence on strike. (Tr. 56-59; Charging Party Ex. 1, 2, 3, and 4)

The change of the net credited service date affected length of vacations, pension eligibility, sick disability benefits, termination payments and telephone concessions. (Tr. 43-45; Respondent Exhibit 1)

REASONS FOR GRANTING THE WRIT.

This Court should issue its Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit in this case for the following reasons:

1. The Court of Appeals founded its decision upon the rationale that there is a distinction between seniority rights, which are accrued as a result of years of service, and other fringe benefits such as pension, vacation, and related benefits which, it said, arise from actual work performed. This theory was evolved by the National Labor Relations Board in its decision of *General Electric Co.*, 80 NLRB 510. By reaffirming the *General Electric* decision, the Circuit Court has failed to recognize that pensions, vacations, and all other fringe benefits are predicated upon the maintenance of the employer-employee relationship under circumstances that provide for the continuation of such rights.

The entitlement to fringe benefit continuation has been recognized by this Court in its decisions in *Erie Resistor Corp.*, 373 U. S. 221, *Great Dane Trailers, Inc.*, 388 U. S. 26, and *Fleetwood Trailer Co.*, 389 U. S. 375. Where, as here, the collective bargaining agreement of the employees, who engaged in the strike, continued in effect throughout the terms of the strike, the employees were entitled to all fringe benefits which resulted from the continuation of the employer-employee relationship.

The deprivation of these benefits is discrimination in the terms and conditions of employment because it is inherently destructive of the employee's right to engage in a strike. *Erie Resistor Corp., supra.*

This presents a serious question which has not been, but should be decided by this Court.

2. The Court below found that the employer's state-

ment to the employees, that it was going to diminish their fringe benefits if they remained on strike, was insufficient to amount to a threat because the employer had the right to give a warning of intent to do that which it was legally entitled to perform.

However, it is, and has been, this Court's holding that conduct which has a tendency to inherently discourage union activity is a threat within the meaning of the Statute. *Radio Officers* v. *Labor Board,* 347 U. S. 17.

In addition, this Court has held that a valid business purpose must exist for any action by an employer which has a discouraging effect upon the employee's present or future concerted activity. *Great Dane Trailers, Inc.,* 388 U. S. 26.

The rationale of the *Great Dane* decision of this Court has been interpreted by the Circuit Court of Appeals for the Second Circuit to apply to a situation which would be a threat under Section 8(a)(1) of the Statute as well as discrimination under Section 8(a)(3). *Tex Tan Welhausen Company,* 419 F. 2d 1265.

This Court should grant review of this matter because of the conflict between the decision below and this Court's decisions, and because of the split between the Seventh Circuit Court of Appeals and the Fifth Circuit Court of Appeals.

I.

The fundamental error of the Court of Appeals, as with the National Labor Relations Board before it, is that an attempt is made to distinguish between the benefits which arise from an employee's continuation in the employer-employee relationship under a valid collective bargaining agreement. The Circuit Court's purported distinction between what has been called seniority on the one hand,

and benefits related to work performed on the other hand, is a result of the Board's decision in the *General Electric Company* case, 80 NLRB 510. However, the *General Electric* decision by the Board was erroneous as a matter of law when issued, and has resulted in a patchwork of decisions which have attempted to reconcile the purported distinction between categories of employee's rights where no real difference exists.

The error that an employee's right to seniority is different in nature from the employee's right to other fringe benefits, such as pension and vacations, has resulted in the evolution of theories such as the "active work" theory and the "years of service" theory, in order to ascertain if there is an accrued right to fringe benefit entitlement. However, it is clear that the attempts to distinguish between accrued versus future fringe benefits entitlement is a fiction.

This Court, in its decisions of *Erie Resistor, supra, Great Dane, supra and Fleetwood, supra,* emphasize the employer-employee relationships as the basic source of employee rights. Since the employer and employee relationship is the source of all employee rights under a collective bargaining agreement (or even in the absence of one), then a continuation of that relationship must result in the entitlement to such benefits.

The original error of the Labor Board was its failure to recognize this source of employee rights. In the *General Electric* case it found the company, there, guilty of violating the statute by having an improper motivation in that it attempted to discriminate against its employees by moving of the service date. The Board in that case held that deferred benefits like retirement and vacation benefits are a form of wages citing *Inland Steel Co.,* 77 NLRB 1.

From this very general equating of deferred benefits to wages, as allegedly set out in the *Inland Steel* case,

the Board reasoned that an employer need not pay such benefits as vacation and pension to strikers. However, in the *Inland Steel* case, *supra,* the Board stated that not only are pensions and vacations like wages, but that they are also within the scope of other conditions of employment.

The Seventh Circuit Court of Appeals, in enforcing the Board's order requiring that Inland Steel bargain with the union, concerning pensions in particular, stated that it found the Board's rationale that retirement and pension plans are conditions of employment to be sound and specifically affirms that aspect of the decision, *Inland Steel* (1948), 170 F. 2d at 250 and 251.

Thus the Board, in the *General Electric* case, merely seized upon one of the two relevant aspects considered by both the Board and the Circuit Court in its affirmation of the *Inland* decision. That error is seen from the Seventh Circuit's statement that it did not dispute Inland Steel's contention that the pensions paid to employees are in reality a payment for an employee's living up to the condition of maintaining the employee relationship for the requisite number of years.

However, even if the theory postulated in the *General Electric* case were valid when written, subsequent events, embodied in the statutory amendments enacted by Congress and the decisions of this Court, most notably *Great Dane* and *Fleetwood* and *Erie Resistor,* have shown the error of the previous theory. Following the issuance of the *General Electric* decision, Congress added Section 9(c)(3) to the National Labor Relations Act. The section guaranteed to economic strikers the right to retain an interest in their employment.

This Court, in *Erie Resistor,* in part, relied upon that amendment to uphold the Board's ruling that an employer may not grant superseniority to strike replace-

ments. Carrying on this theory, this Court in the *Fleetwood Trailer,* reasoned that an employee under Section 2(3) of the Act continues to be an employee unless he has obtained regular and substantially equivalent employment elsewhere, after having gone on strike. This Court has clearly followed the Congressional intent in recognizing that strikers maintain their employer-employee relationships and continue to be entitled to all of the rights and benefits derivative therefrom.

This Court's rationale in the *Erie Resistor, Great Dane* and *Fleetwood* cases is predicated upon the concept that an employee's total service rendered to an employer should result in benefits arising from that relationship. Thus an employee who has pledged his life's work to the employer is necessarily entitled to vacations and a pension, based upon his total employment. To conclude, as did the Court of Appeals and the Board, that the employer may limit the amount of vacation or pension rights of an employee because he went on strike and credit him only for the total actual work performed, is to forget that these rights emanate from the entire term of employment, and the offering of one's total life work rather than hours and minutes of service.

II.

The Court of Appeals concluded that no threat resulted from the Employer's message to the striking employees because it was merely a warning of the intent to make adjustments in the employees' net credited service date. Since the Court found that the adjustment of the net credited service date was not discrimination then it concluded that there could be no threat to give the warning of its intention to engage in conduct the Court found permissible.

The Court adopted the theory of the majority of the Labor Board that there is a distinction between seniority

and net credited service. As was argued above, no such distinction should be made because all employee rights are predicated upon the maintenance of the employer-employee relationship.

As was argued by the Petitioner below, there is no necessity for proof that the employer had the specific intent to threaten or restrain or coerce its employees when it issued the memo of June 4th. This Court has long recognized that the specific proof of such intent is unnecessary where the employer's conduct inherently discourages union activities. *Radio Officers* v. *Labor Board* (1954), 347 U. S. 17, 45 *et seq.* This Court made it perfectly clear that an employer may not hide behind the fact that there is no proof of intent to discourage union activities as long as the natural consequences of his actions result in the discouragement of union activity. This basic principle has been applied numerous times by this Court and many Court of Appeals.

The decision of the Court of Appeals fails to mention this Court's decision in the *Radio Officers* case, *supra,* in spite of the citation of that Court's recent decision which applied the rationale to a situation similar to the instant case. (See *NLRB* v. *Darling and Company,* 420 F. 2d 63) The propriety of this Court's decision in *Radio Officers, supra,* is beyond question.

More importantly, the Circuit Court's decision failed to recognize that the Employer is under an obligation to come forward with a legitimate business explanation for any of its conduct which inherently discourages union activities. *Great Dane Trailer, supra.* As the record now stands, there is absolutely no legitimate explanation for the sending of the June 4 message to the employees.

The Court of Appeals for Fifth Circuit has held that this shifting of the burden of proof to the employer occurs

whether the conduct violated Section 8(a)(3) as discrimination or Section 8(a)(1) as restraint. *Tex Tan Welhausen Company,* 419 F. 2d 1265 (at 1271). Thus, the Circuit Court's failure to apply the *Great Dane* criteria has placed it in direct conflict with the Fifth Circuit.

Of even greater significance, the Circuit Court's adoption of the reasons set forth by the Trial Examiner and the majority of the Labor Board for finding no violation has resulted in the shifting of the burden of proof to the employees and the Petitioner. Therefore, instead of applying this Court's *Great Dane* decision to the employer, the Circuit Court has made a perverted application of the rationale of that case to the Petitioner, and to the employees that it represents. The decision below is in direct conflict with the *Great Dane* decision of this Court.

CONCLUSION.

Wherefore, for the above and foregoing reasons petitioners pray that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

Chicago, Illinois 60604.

Wednesday, August 11, 1971.

Before

HON. LUTHER M. SWYGERT, *Chief Judge*

HON. JOHN PAUL STEVENS, *Circuit Judge*

HON. ROBERT A. SPRECHER, *Circuit Judge*

No. 18161

SYSTEM COUNCIL T-4, Comprised of Local Unions 134, 165, 315, 336 and 399, of The International Brotherhood of Electrical Workers, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Review of an Order of the National Labor Relations Board.

IT IS ORDERED by the Court that the petition for rehearing filed in this appeal be and the same is hereby denied.

APPENDIX B.

UNITED STATES COURT OF APPEALS.
For the Seventh Circuit.

July 19, 1971

Before

HON. LUTHER M. SWYGERT, *Chief Judge*
HON. JOHN PAUL STEVENS, *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*

No. 18161 SYSTEM COUNCIL T-4, Comprised of Local Unions 134, 165, 315, 336 and 399, of The International Brotherhood of Electrical Workers, AFL-CIO, *Petitioner,* *vs.* NATIONAL LABOR RELATIONS BOARD, *Respondent.*	Petition to Review and Set Aside an Order of the National Labor Relations Board.

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that/the decision of the Petition to Review and Set Aside the National Labor Relations Board entered in this cause on November 24, 1969 be, and the same is hereby, DENIED.

APPENDIX C.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

SEPTEMBER TERM, 1970 APRIL SESSION, 1971

No. 18161
SYSTEM COUNCIL T-4, Comprised of Local Unions 134, 165, 315, 336 and 399, of The International Brotherhood of Electrical Workers, AFL-CIO,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition to Review and Set Aside an Order of the National Labor Relations Board.

July 19, 1971

Before SWYGERT, *Chief Judge,* STEVENS and SPRECHER, *Circuit Judges.*

SPRECHER, *Circuit Judge.* This is a petition to review and set aside an NLRB order[1] dismissing a complaint issued after unfair labor charges by System Council T-4 ("Union") against the Illinois Bell Telephone Company. We deny the petition.

1. The Board's order is reported at 179 NLRB No. 119 (1969).

I.

The Union first charges the Company with a violation of Section 8(a)(1) of the National Labor Relations Act.[2] Approximately 11,800 employees in units represented by the Union went out on strike on May 8, 1968, in support of economic demands during contract negotiations. On June 4, the Company mailed to its employees this document, entitled "Important Message to All Employees":

> If you have been off the job on an unpaid absence, you should know it is a long-standing Company practice to adjust an employee's net credited service date whenever the number of unpaid days of absence exceeds 30 consecutive days. (Service dates are important in computing such things as vacation allowances, benefits, pension dates, and other items.)
>
> If any employee who has not been reporting for work because of strikes does report for work by June 6, 1968, no adjustment in the service date will be made. But under this practice, any employee who hase been absent because of strikes and who does not report for work by June 6 will have his service date adjusted by the number of unpaid consecutive days absent in excess of 30.
>
> All unions representing Illinois Bell employees have been reminded of this practice and advised that this information is being distributed to all employees.

The trial examiner, whose findings were adopted by the Board, found that under the parties' collective bargaining agreement and practice the "net credited service" referred to in the message determines length of vacations and entitlement to pensions, sick benefits, termination pay, and telephone concessions. Seniority, on the other hand, affects choice of vacation time, promotion eligibility, choice of hours, and order of layoff and recall. The Union

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2. U. S. C. § 158(a) states: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title. . . ."

concedes that the Company never did advance the seniority date of any striker. But the Union alleges that the June 4 message, by warning of an adjustment in the net credited service date, contained a threat to affect the strikers' seniority. Its argument is based on the fact that, prior to May 8, an employee's net credited service date usually coincided with his seniority date. A threat to halt accumulation of seniority during the remainder of the strike, the Union states correctly, would restrain employees in violation of Section 8(a)(1). *See NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221 (1963); *Swarco, Inc.* v. *NLRB*, 303 F. 2d 668, 672 (6th Cir. 1962); *cert. denied*, 373 U. S. 931 (1963).

In deciding that the June 4 letter did not threaten loss of seniority, the trial examiner relied primarily on the language of the message, which mentions only net credited service and not seniority. He noted that the letter accurately stated which benefits would be affected by a change in service date. We agree with the examiner's construction of the letter and believe that the following facts cited by him support his conclusion:

(1) Personnel records were available for employees to check for variances between seniority and service dates. (2) Later in the strike, the Company made clear its policy not to adjust seniority dates and offered to incorporate an assurance to that effect in the new collective bargaining agreement. (3) There was no evidence that the letter had any impact on the effectiveness of the strike. (4) The Union could have clarified the significance of the letter if its members had been confused; it did not attempt to do so. The Union points to the paucity of proof that the Company's practice as set forth in the message was in fact "long-standing," and to the fact that the Company had never before communicated its practice to its employees, but these faults are easily explained—no strike against Illinois Bell had ever lasted more than 30 days.

There is substantial evidence in the record to support the Board's findings. *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474 (1951); *NLRB* v. *Walton Mfg. Co.,* 369 U. S. 404 (1962).

We therefore conclude that the June 4 message did not threaten the strikers with loss of seniority. Of course it did tell the strikers that their net credited service dates would be adjusted if they remained on strike for more than 30 consecutive days. But since the adjustment itself was lawful, as we hold below, the warning of intent to make the adjustment does not violate Section 8(a)(1). *Kansas Milling Co.* v. *NLRB,* 185 F. 2d 413, 420 (10th Cir. 1950).

II

The Union's second charge is that the Company, in moving ahead the strikers' net credited service dates, violated Section 8(a)(3)[3] by discriminating against those employees who remained on strike more than 30 consecutive days.

Before reaching the merits of this charge, we must consider the Company's contention that the Board should not have entertained the 8(a)(3) charge because it was not stated plainly in the complaint.[4] The complaint alleged that the Company denied service credit for the period of the strike after June 6 (para. V), and that such act discriminated against its employees in violation of Section 8(a)(3) (para. IX). We believe the complaint was broad enough to encompass the Union's charge of discrimination

3. 29 U. S. C. § 158(a) states: "It shall be an unfair labor practice for an employer— . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

4. General Counsel for the NLRB seems to have abandoned the 8(a)(3) charge during the hearing, but the Union continued to press it.

in the adjustment of the service date. *See Frito Co.* v. *NLRB,* 330 F. 2d 458 (9th Cir. 1964). Thus the substantive issue is properly before us.

The Union's argument begins with *General Electric Co.,* 80 NLRB 510 (1948), which held that an employer could not suspend the accumulation of seniority during a strike, but could halt the accrual of vacation and pension benefits. The Board reasoned that, because vacation pay and pensions are a form of deferred benefits,[5] and because an employer is not required to remunerate strikers for work not performed, denial of such benefits does not discriminate against the strikers. Under *General Electric,* the adjustment of the net credited service date does not violate Section 8(a)(3).

The Union contends that subsequent Supreme Court cases undermine the rationale of *General Electric,* so that whenever an employer discriminates against any employee rights, he must establish that his motive was not anti-union. *See NLRB* v. *Great Dane Trailers, Inc.,* 388 U. S. 26 (1967); *NLRB* v. *Fleetwood Trailers Co., Inc.,* 389 U. S. 375 (1967).

A review of "fringe benefits" cases since *General Electric* shows that there are two major categories of benefits an employer may not withhold from striking employees under Section 8(a)(3). The first category includes any benefit which will give a nonstriking employee a preferred position over a striker on a long-term basis. These benefits are not in the nature of compensation for work performed; they are systems which give one employee priority over another in choosing hours or vacation times, or in setting an order for layoffs or promotions. Examples of these cases are *NLRB* v. *Erie Resistor Corp.,* 373 U. S. 221 (1963) (giving "super-seniority" to replacement and returning strikers as insurance against

5. *Inland Steel Co.* v. *NLRB,* 170 F. 2d 247 (7th Cir. 1948), *cert. denied,* 336 U. S. 960 (1949).

future layoffs); *NLRB* v. *Fleetwood Trailers Co., Inc.*, 389 U. S. 375 (1967) (hiring new employees when strikers were available for reinstatement); *NLRB* v. *Duncan Foundry and Machine Works, Inc.*, 435 F. 2d 612 (7th Cir. 1970) (rehiring strikers as "temporary" employees).

The other category of benefits an employer may not deny consists of any rights earned by the employee before the strike began. Withholding accrued benefits from strikers is conduct "inherently destructive" of employee rights and is an unfair labor practice unless the employer can prove a legitimate business purpose. *NLRB* v. *Great Dane Trailers, Inc.*, 388 U. S. 26 (1967); *NLRB* v. *Duncan Foundry and Machine Works, Inc.*, 435 F. 2d 612 (7th Cir. 1970) (denying accrued vacation payments in both cases); *Tex-Tan Welhausen Co.* v. *NLRB*, 419 F. 2d 1265 (5th Cir. 1969), *vacated on other grounds*, 397 U. S. 819 (1970) (denying all vacation benefits because employees were not at work on December 31 or were absent more than 280 hours, where plan called for percentage payment according to annual salary).[6]

Conduct outside these two categories has never been held to amount to the sort of discrimination condemned in Section 8(a)(3). In *Tex-Tan Welhausen Co.* v. *NLRB*, *supra*, the company was allowed to compute vacation pay as a percentage of annual salary, thus reducing the benefit in proportion to the amount of strike time. The Board in *Mooney Aircraft, Inc.*, 148 NLRB 1057 (1964), *enforced* 366 F. 2d 809 (5th Cir. 1966), found no discrimination where the company, which required one year of work for vacation eligibility, refused to pay vacation benefits to strikers who had not worked a full year when the strike began. Health insurance premiums were called deferred benefits in *Ace Tank and Heater Co.*, 167 NLRB 663 (1967).

6. The fact that the employees were out on an unfair labor practices strike was also a deciding factor in the court's finding of discrimination.

The employer was not required to make premium payments during the strike, but was forced to pay medical expenses incurred after the uninsured striker returned to work.

In *Kimberly-Clark Corp.*, 171 NLRB No. 82 (1968), the Board adopted the thorough analysis of *Great Dane* by the trial examiner, who stated, ". . . I do not regard the decision of the Supreme Court in *Great Dane Trailers* . . . as precluding reliance on the often stated axiom that an employer need not remunerate strikers for work not performed." 171 NLRB No. 82 at 13. He found no discrimination in the company's denial of "service credits" (which served a purpose similar to Illinois Bell's net credited service) during the period of the strike.[7]

We believe the Supreme Court in *Great Dane* and *Fleetwood Trailers* did not intend to overrule *General Electric;* we reaffirm the validity of its distinction between seniority (and the benefits traditionally dependent upon it) and benefits related to work performed. Because the benefits affected by the change in the net credited service dates clearly fall into the latter classification, we find there has been no discrimination to activate the employer-burden rule of *Great Dane.* An employer may not prefer a nonstriking employee over a striker on a seniority list, but a company need not compensate a striker—with wages or deferred benefits—for work not performed.

The Union's petition to set aside the NLRB order is denied.

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7. In *Kimberly-Clark* the examiner mentions a complaint (abandoned by the union during grievance procedures) which is also present in our case: An employee who was hired—for example—in December 1958 and was on strike for five months would have his net credited service date moved forward to March 1959. Instead of being eligible for three weeks' vacation pay in 1968, he would not be eligible until 1969. We consider this result a "comparatively slight" harm to employee rights which the Supreme Court condoned in *Great Dane,* 388 U. S. at 34.